No. 96-8732

In the Supreme Court of the United States

OCTOBER TERM, 1997

VINCENT EDWARDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a general verdict of guilty in a federal prosecution for conspiracy to possess and distribute a controlled substance permits the sentencing court to consider only the type and quantity of drug involved in the conspiracy that would yield the lowest sentence under the Sentencing Guidelines.

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 179-186) is reported at 105 F.3d 1179. The judgments and sentencing orders entered by the district court (J.A. 26-178) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1997. The petition for a writ of certiorari was filed on April 21, 1997, and granted on October 20, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINES INVOLVED

1. Sections 401 and 406 of the Controlled Substances Act, Pub. L. No. 91-513, Title II, 84 Stat. 1260, 1265, as amended, 21 U.S.C. 841 and 846, are reprinted at pages 2-15 of the appendix to petitioner's opening brief.

2. Sections 1B1.3, 2D1.1 and 6A1.3 of the Sentencing Guidelines promulgated by the United States Sentencing Commission, as amended to November 1, 1994, and portions of the accompanying commentary are reprinted in the appendix to this brief.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, each petitioner was convicted of participating in a conspiracy to possess with the intent to distribute, and to distribute, cocaine and cocaine base ("crack" cocaine), in violation of 21 U.S.C. 846. Petitioners Tidwell, Edwards, and Wintersmith were also convicted of possession of crack cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Tidwell was convicted of using and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Petitioners were sentenced to terms of imprisonment ranging from 120 months to life. See page 6, *infra*. The court of appeals affirmed. J.A. 179-186.

1. The indictment in this case alleged that petitioners were members of a large conspiracy that distributed powder and crack cocaine from 1989 to 1993, primarily in Rockford, Illinois. J.A. 5-7. The conspiracy was organized and directed by a core group known as "the Mob." Tr. 775, 843. Members of

the Mob obtained kilogram quantities of powder cocaine, "cooked" some of it into crack cocaine, and then resold the drugs in smaller quantities in either powder or crack form. See, *e.g.*, Tr. 775, 789, 802, 835, 838-839, 874-882, 1723, 1768-1769. They held weekly meetings to discuss business, made key decisions by majority vote, and divided profits equally. See, *e.g.*, Tr. 808-811, 832, 835-836, 840, 885, 910, 1016-1017, 1267, 1293. The Mob employed "workers" to sell drugs and "runners" to keep the workers supplied and to retrieve drug proceeds. See, *e.g.*, Tr. 883-885, 1731, 1859; see also *United States* v. *Evans*, 92 F.3d 540, 541-542 (7th Cir.) (describing same conspiracy), cert. denied, 117 S. Ct. 404 (1996).[1]

2. In November 1993 a federal grand jury charged petitioners and 15 others with various federal drug and firearms crimes. See J.A. 4-12 (relevant counts). The first count of the superseding indictment charged that petitioners and others violated 21 U.S.C. 846 by conspiring "to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1)." J.A. 6-7. Petitioners Edwards, Wintersmith, and Tidwell were also charged with possession of cocaine base with the intent to dis-

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[1] The activities of the conspirators from 1991 through 1993 are described in detail, with record citations, at pages 4-14 of the government's brief in the court of appeals. The district court's extensive findings, for purposes of sentencing, concerning petitioners' various roles and activities in connection with the conspiracy are set out at J.A. 37-39, 42-47 (Edwards); 64-70, 72-82 (Fort); 97-104, 107-112 (Wintersmith); 130-134, 136-141 (Joiner); 159-169, 172-174, 177-178 (Tidwell).

tribute it, in violation of 21 U.S.C. 841(a)(1), and petitioner Tidwell was charged with using and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). J.A. 11-12.[2]

Five defendants pleaded guilty, and the remaining 15 were tried in three groups. J.A. 179. Petitioners were tried together in a three-week trial. The government's evidence showed that in 1991 and early 1992 the conspirators sold powder cocaine, but that from the spring of 1992 onward they dealt primarily in crack. See, *e.g.*, J.A. 73-82; Pet. 4; Tr. 843, 871, 873, 928, 1050, 1422; see also Tr. 1770. Evidence of the conspirators' involvement in the manufacture and sale of crack cocaine included the testimony of co-conspirators (see, *e.g.*, Tr. 849-855, 871, 872-873, 892-893, 928, 931, 948, 1416-1418, 1746-1750, 1768-1770, 1893-1897); numerous tape-recorded conversations relating to crack cocaine (see, *e.g.*, R. No. 1447, Gov't Exhs. 10, 12, 61); several purchases of crack from co-conspirators (see, *e.g.*, Tr. 1698-1703; R. No. 1447, Gov't Exhs. 175, 178-1, 192-1); seizures of crack from co-conspirators, including one seizure of almost a kilogram of crack (see, *e.g.*, Tr. 507, 528-531, 537-538, 669-677, 1046-1049, 1127, 2020-2022); and the recovery from Mob drug houses of crack-related paraphernalia such as baking soda boxes and both razor blades and paper towels coated with crack (see, *e.g.*, Tr. 569-570, 592-595, 600-601, 602-606, 638-639).

At the conclusion of the evidence, the trial court instructed the jury in part as follows (J.A. 16):

> The indictment charges in Count One that the defendants conspired to possess with the intent to distribute and to distribute cocaine and cocaine base and in Counts Four and Five that a certain amount of cocaine base was possessed with the intent to distribute.
>
> The government does not have to prove that the alleged conspiracy involved an exact amount of cocaine or cocaine base. Neither does the government have to prove that the exact amount of cocaine base charged in the indictment was possessed with the intent to distribute. However, the government must prove that the conspiracy and the possession charges involved measurable amounts of cocaine or cocaine base.

[2] An additional count charging petitioner Fort with distribution of cocaine base was dismissed before trial.

Petitioners did not object to that instruction on the ground that it varied from the indictment, or on the ground that a guilty verdict would not reveal whether the conspiracy had involved powder cocaine, cocaine base, or both. J.A. 180; Tr. 2720-2721.[3] Nor did they object to the court's use of general verdict forms, which did not require that the jury specify which drug or drugs petitioners had conspired to possess and distribute. J.A. 180. The jury found each petitioner guilty of "the drug conspiracy charge contained in Count One of the indictment." J.A. 18-20, 22-23.

Before sentencing petitioners, the district court carefully reviewed the record (see, *e.g.*, J.A. 43, 73,

[3] Counsel for petitioner Tidwell objected that the instruction was "confusing as to that." Tr. 2720. The record does not clarify the basis for that objection. Petitioner Fort argued that the reference to a "measurable amount" was "confusing" because there was "no reference or determination what is a measurable amount." Tr. 2720-2721. The district court rejected both objections. Tr. 2721.

136) in order to determine what quantities of powder and crack cocaine should be attributed to each petitioner for sentencing purposes. Considering each petitioner separately, and often stating that it was using conservative or discounted estimates based on the evidence introduced at trial (see, *e.g.*, J.A. 74-75, 109, 112), the court attributed 14.5 kilograms of powder cocaine and 9.5 kilograms of crack to petitioner Fort (J.A. 72-82); 9 kilograms of powder and 9 kilograms of crack to petitioner Wintersmith (J.A. 107-112); 523.6 grams of powder and 448 grams of crack to petitioner Tidwell (J.A. 163-169); 201 grams of powder and 5.32 grams of crack to petitioner Edwards (J.A. 42-47); and 7 grams of powder and 14 grams of crack to petitioner Joiner (J.A. 136-141). Petitioners did not argue that the general form of the jury's verdict precluded the court from considering evidence of crack cocaine at sentencing.

Based on these type-and-quantity findings and other factors relevant under the federal Sentencing Guidelines, the court sentenced petitioners Fort and Wintersmith to life imprisonment for their roles in the conspiracy. J.A. 49-51, 87-89. Petitioner Wintersmith also received a concurrent sentence of 40 years' imprisonment for his possession offense. J.A. 89. Petitioner Tidwell was sentenced to concurrent terms of 252 months' imprisonment for conspiracy and 240 months' imprisonment for possession, with a consecutive term of five years' imprisonment for using and carrying a firearm during and in relation to a drug trafficking offense. J.A. 143-145. Petitioner Edwards was sentenced to concurrent 120-month imprisonment terms for conspiracy and possession. J.A. 26-28. Petitioner Joiner was sentenced to 126 months' imprisonment for conspiracy. J.A. 114-116. Each sentence also included a provision for supervised release and a $1000 or $2000 fine. See also Pet. Br. 4-5.

3. The court of appeals affirmed. J.A. 179-186. The court rejected petitioners' contention that, because the jury's verdict did not unambiguously establish that they had conspired to sell any crack cocaine, the district court should therefore have sentenced them, with respect to their conspiracy convictions, as if all of the cocaine involved in the conspiracy had been powder cocaine. J.A. 180-185. Although the court began by noting that petitioners had not objected to the district court's instructions or verdict forms on that basis, and that the plain-error standard of review therefore applied, it went on to hold, more broadly, that there was "no error, and hence no plain error, in this case." J.A. 180-181.

The court first observed that "under the Sentencing Guidelines, the judge alone determines which drug was distributed and in what quantity." J.A. 181. The court reasoned that under Sentencing Guidelines § 1B1.3, which requires the judge to take into account "relevant conduct" outside the offense of conviction, the judge must "consider drugs that were part of the same plan or course of conduct, whether or not they were specified in the indictment." J.A. 181. Therefore, the court continued, "[a] judge * * * may base a sentence on kinds and quantities of drugs that were not considered by the jury." *Ibid.* Indeed, "[b]ecause sentencing depends on proof by a preponderance of the evidence, while conviction depends on proof beyond a reasonable doubt, the judge may even base a sentence on events underlying charges for which the jury returned a verdict of acquittal." J.A. 182. Accordingly, "[w]hat a jury believes about which drug the conspirators distributed * * * is not conclusive—

and a verdict that fails to answer a question committed to the judge does not restrict the judge's sentencing options." *Ibid.*

The court acknowledged that some other courts of appeals have held that, when a jury returns a general verdict on a conspiracy charge that specifies the involvement of multiple drugs, the defendant must be sentenced as if the conspiracy involved only the drug carrying the lowest penalty. J.A. 181. The court declined to follow those decisions, however, because it concluded that they failed to honor the principle that the judge is responsible, under applicable law, for determining the type and amount of drugs involved in the conspiracy. J.A. 181-185.

SUMMARY OF ARGUMENT

Petitioners were convicted of participating in a drug-trafficking conspiracy in violation of 21 U.S.C. 846. The indictment alleged that the conspiracy involved both powder and "crack" cocaine, but the jury was instructed that it could convict petitioners if it found that the conspiracy involved either drug. Petitioners argue that the jury's verdict does not make clear what drug or drugs they conspired to distribute, and that the district court was therefore required to sentence them only on the basis of the drug that would produce the lowest possible sentence.

Petitioners' sentences resulted from applying two sets of rules: the statutory maximum and minimum sentences specified in 21 U.S.C. 841(b), and incorporated by reference in Section 846, and the applicable provisions of the federal Sentencing Guidelines. The facts of this case present no statutory claim with regard to the type of drug involved in petitioners' offense, because computing the statutory sentencing

range for each petitioner solely on the basis of the powder cocaine involved in the conspiracy would not require any change in the sentences imposed by the district court. Accordingly, petitioners could benefit from their ambiguous-verdict claim only if district courts were required to determine Guidelines sentencing ranges solely on the basis of types of drugs necessarily considered by a jury in reaching its verdict.

No such rule could be squared with the "relevant conduct" provisions of the Guidelines themselves. Even if the district court in this case had assumed that petitioners' "offense of conviction" was solely a conspiracy to distribute powder cocaine, the Guidelines would nonetheless have required the court to take into account, in setting each petitioner's base offense level, any illegal activity involving crack cocaine that the court found to be part of the same "course of conduct" or "common scheme or plan" (or to be reasonably foreseeable as part of the conspiracy). Under this Court's decisions, the same result would have followed even if the indictment had never mentioned crack cocaine, or if it had charged a separate conspiracy to distribute crack and the jury had acquitted petitioners on that charge. Petitioners can therefore derive no sentencing benefit under the Guidelines from their theory that the jury's verdict was ambiguous as to the the type of controlled substance involved in the conspiracy.

Perhaps for that reason, petitioners advance a more ambitious theory in their brief on the merits than they advanced below or in their petition for certiorari. Petitioners argue, in effect, that in sentencing for a drug distribution conspiracy charged under 21 U.S.C. 841 and 846, a district court may not apply any of the

enhanced statutory sentencing ranges set out in Section 841(b) unless the government has pleaded, and a jury has determined, both the type and the *quantity* of drugs involved in the conspiracy. Neither the type nor the quantity of the drugs involved is, however, an element of the conspiracy offense defined by Section 846, or of the substantive distribution crimes defined by Section 841. The language and structure of the relevant statutory provisions make clear that type and quantity are factors to be taken into account at sentencing.

Petitioners raise a number of other arguments, most of them resting on the fundamental misconception that the conspiracy count in this case charged them with two different conspiracies. In fact, petitioners were charged with engaging in *one* conspiracy to engage in conduct that would involve committing a variety of substantive offenses. The indictment in this case satisfied applicable standards of notice, and nothing in the proof at trial or in the jury instructions constituted an impermissible amendment of the indictment. Nor does any aspect of petitioners' sentences violate principles of double jeopardy, deprive petitioners of any right to a valid jury verdict, or offend any general principle of the law of conspiracy.

ARGUMENT

THE DISTRICT COURT PROPERLY TOOK INTO ACCOUNT AT SENTENCING ALL OF THE DRUGS INVOLVED IN PETITIONERS' CONSPIRACY

The indictment in this case charged petitioners with violating 21 U.S.C. 846 by conspiring:

> to possess with intent to distribute and to distribute mixtures containing cocaine, a Schedule II Narcotic Drug Controlled Substance, and cocaine base, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

J.A. 6-7. At trial, the government introduced—as petitioners concede (Br. 37)—sufficient evidence to support a verdict that petitioners had conspired to traffic in either substance, or in both. The district court instructed the jury that it could convict petitioners of conspiracy if it found that "the conspiracy * * * involved measurable amounts of cocaine or cocaine base." J.A. 16. The jury then returned general verdicts finding each petitioner guilty of "the drug conspiracy charge" against him. J.A. 18-23. Petitioners contend that, because the quoted jury instruction was phrased in the alternative, the guilty verdicts are "fundamentally ambiguous" because they do not specify "the statutory object of the conspiracy" under 21 U.S.C. 846, and "[i]t is impossible to tell, therefore, whether the jury found the Petitioners each guilty of conspiracy to distribute powder cocaine only, cocaine base only, or both powder cocaine and cocaine base." Pet. Br. 9.

Petitioners do not challenge the validity of their conspiracy convictions. They argue only that the

sentences imposed by the district court are improper because they rest in part on the district court's determination—based largely on the same evidence that was introduced before the jury at trial—that petitioners' conspiracy involved the possession and distribution of both powder cocaine and cocaine base, or "crack." Petitioners' claim misunderstands both the nature of the offense charged in a prosecution under Section 846 and the role of the judge under the Sentencing Guidelines. Under a correct analysis, the court in this case properly took into account crack as well as powder in sentencing petitioners, even if, as petitioners claim, the jury instructions failed to require the jury to specify which of those controlled substances supported the conspiracy verdict against them.[4]

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[4] As petitioners note (Br. 9 n.5), the government conceded in its brief to the court of appeals (at 31 n.12) that the jury instructions allowed the jury to find them guilty of a conspiracy involving powder "or" crack cocaine. The court of appeals' decision (J.A. 180), the petition (at i, 8), and the government's response (at i, 9) all proceeded on the premise that the jury's general verdict was therefore ambiguous. A close reading of the relevant instructions (see pages 4-5, *supra*; J.A. 14-16) might support the view that the conjunction "or" in the critical sentence was intended to reflect the simultaneous discussion, in that sentence, of not only the conspiracy charge but also the possession charges, involving only cocaine base, that were also brought against some of the defendants. On that basis one might argue that, taking all the instructions together, the jury would have understood that it could find a conspiracy only if it found that petitioners' agreement involved "cocaine *and* cocaine base" (J.A. 16) (emphasis added). We do not raise such an argument at this stage. Cf. *Rogers* v. *United States*, No. 96-1279 (Jan. 14, 1998). We do observe, however, that the government argued below that the court of appeals could infer that the jury found a conspiracy involving crack cocaine because

A. Petitioners' Activities Involving "Crack" Cocaine Were "Relevant Conduct" That The Court Was Required To Take Into Account Under The Sentencing Guidelines

1. The sentences imposed on petitioners resulted from the application of two bodies of law. First, the statutory sentencing ranges applicable to petitioners' conspiracy offense depended on the application of rules found in Title 21 of the United States Code. Section 846 of Title 21 provides that:

> Any person who attempts or conspires to commit any offense defined in [21 U.S.C. 801-904] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

The government may therefore establish a violation of Section 846 by proving that the defendant agreed to commit any of a variety of substantive drug-trafficking offenses. See generally, *e.g.*, *United States* v. *Shabani*, 513 U.S. 10, 16 (1994); *United States* v. *Morgan*, 835 F.2d 79, 82 (5th Cir. 1987). Where the object offense is a distribution offense defined by 21 U.S.C. 841(a)(1), the applicable statutory penalties are established in Section 841(b). That subsection varies the applicable punishments depending on the type and amount of controlled substance involved in the of-

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three of petitioners were found guilty of substantive offenses involving crack, and because the evidence at trial overwhelmingly established that the conspiracy involved crack cocaine. Gov't C.A. Br. 33-35. The court of appeals did not reach those contentions. Accordingly, should this Court reverse the judgment below, it should nonetheless remand to the court of appeals to determine whether the conspiracy verdicts in this case were, in fact, ambiguous.

fense, any bodily injuries or deaths resulting from the offense, and the offender's criminal history. See 21 U.S.C. 841(b). Accordingly, fixing the applicable statutory maximum and minimum punishments for a Section 846 conspiracy to distribute controlled substances in violation of Section 841(a)(1) requires a sentencing court to turn to Section 841(b) and to determine, among other things, the types and quantities of controlled substances involved in the conspiracy offense.

The second step of the sentencing process then requires the application of the federal Sentencing Guidelines. See 18 U.S.C. 3551, 3553; see generally *Mistretta* v. *United States*, 488 U.S. 361 (1989). Guidelines § 2D1.1 specifies different base offense levels for drug conspiracies depending on, among other factors, the type and quantity of drugs involved, as determined by the district court for sentencing purposes (see Guidelines § 6A1.3).[5] The Guidelines do not base sentencing only on conduct underlying the offense of conviction. To the contrary, the "relevant conduct" provisions of Guidelines § 1B1.3 require the sentencing court to take into account, in a case such as this, both "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity" and "all acts and omissions * * * that were part of the same course of conduct or common scheme or plan as the offense of conviction." Guidelines § 2D1.1(a)(3), (c), and application note 12; *id.* § 1B1.3(a)(1)(B), (a)(2), and application note 3. The commentary to Section 1B1.3 explicitly confirms that "in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction." Guidelines § 1B1.3, background.

[5] The district court applied the Guidelines in effect as of November 1, 1994. See J.A. 73. All references in this brief are to that version of the Guidelines. We have reprinted relevant portions of the Guidelines and accompanying commentary in an appendix to this brief.

2. Petitioners claim (Pet. Br. 7-8) that where a jury verdict is ambiguous on the type of controlled substance involved in the offense, the defendant must be either retried or sentenced based on the drug "carrying the lowest statutory sentencing range." To the extent that petitioners' claim relates to *statutory* sentencing ranges, it is irrelevant to this case, because even if it were correct it would have no effect on the actual sentences imposed on petitioners. Computing the statutory maximum and minimum sentences for each petitioner solely on the basis of the powder cocaine the district court found was involved in the conspiracy in this case would not require any change to the terms of imprisonment imposed by that court.[6] Nor would petitioners'

[6] Under the penalty provisions of 21 U.S.C. 841(b)(1), the quantities of powder cocaine the district court attributed to the various petitioners (see page 6, *supra*) established statutory sentencing ranges of 20 years to life in prison for petitioners Fort and Wintersmith, 5-40 years' imprisonment for petitioner Tidwell, and up to 20 years' imprisonment for petitioners Edwards and Joiner. Even if the district court had considered that a conspiracy to distribute powder cocaine was the only offense of conviction, and therefore had considered the amounts of crack cocaine it attributed to each petitioner only as "relevant conduct" under the Guidelines, the Guidelines sentences it imposed on the conspiracy count—life imprisonment for Fort and Wintersmith, 21 years for Tidwell, 10 years for Edwards,

sentences change if the district court was permitted to determine the overall quantity of drugs involved in the conspiracy, but was then required (because of an ambiguous jury verdict) to assume that all of the drugs were powder rather than crack cocaine.[7] Accordingly, petitioners could benefit from the sentencing rule they propose only if some principle required district courts to determine sentencing ranges under

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and 126 months for Joiner—would have fallen within those statutory ranges.

Petitioner Joiner might conceivably argue (although he has not to date) that because he was sentenced only for conspiracy, and because the only applicable sentencing provision was therefore Section 841(b)(1)(C), the five-year term of supervised release imposed by the district court exceeded the three-year maximum term generally authorized by 18 U.S.C. 3583(b)(2) for an offense punishable by more than 10 but less than 25 years' imprisonment (see 18 U.S.C. 3559(a)(3)). Such a claim would lack merit. The better view is that because Section 841(b)(1)(C) requires the imposition of "at least" three years of supervised release, it has "otherwise provided" a supervised-release range within the meaning of Section 3583(b), and therefore supersedes the general maximum term specified in that Section. See *United States* v. *Page*, Nos. 96-4329 & 96-4345, 1997 WL 769370, at *3-*8 (6th Cir. Dec. 2, 1997) (discussing issue at length and joining the Second, Eighth, Ninth and Tenth Circuits in adopting that view); *United States* v. *Eng*, 14 F.3d 165 (2d Cir.), cert. denied, 513 U.S. 807 (1994); but see *United States* v. *Good*, 25 F.3d 218, 221 (4th Cir. 1994); *United States* v. *Kelly*, 974 F.2d 22, 24-25 (5th Cir. 1992). The supervised release term imposed on Joiner was also consistent with the Sentencing Guidelines in effect at the time of sentencing. See Guidelines § 5D1.2(a) (Nov. 1, 1994).

[7] Under that analysis, the statutory ranges would be the same as those set out in note 6 for all petitioners except Tidwell, who would move from the 5-40 year range of Section 841(b)(1)(B) to the 20 years-to-life range of Section 841(b)(1)(A). His 21-year sentence falls within both ranges.

the Sentencing Guidelines based solely on types and quantities of drugs necessarily established by a jury verdict. As the court of appeals recognized (J.A. 181), however, that proposition conflicts with the sentencing rules set forth in the Guidelines and with this Court's cases explaining the Guidelines' operation.

3. In *United States* v. *Watts*, 117 S. Ct. 633, 635-636 (1997) (per curiam), this Court observed that Guidelines § 1B1.3—the "relevant conduct" rule—describes "in sweeping language the conduct that a sentencing court may consider in determining the applicable guideline range." The Court noted that "[t]he commentary to that section states: 'Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range.'" *Ibid.*, quoting Guidelines § 1B1.3, background. Applying that principle, the Court held that the sentencing court may consider conduct underlying charges of which a defendant was acquitted in determining the Guidelines sentencing range for offenses of which he was convicted, "so long as that conduct has been proved by a preponderance of the evidence" to the district court at sentencing. *Id.* at 638; see also *Witte* v. *United States*, 515 U.S. 389, 397, 401-402 (1995) (noting that relevant conduct provisions of the Guidelines simply channel the discretion of sentencing courts to take into account related uncharged misconduct in a manner comparable to pre-Guidelines practice). *Watts* thus makes clear that the entire range of a defendant's related criminal conduct, not simply the conduct underlying the jury's verdict of guilty, may be considered in calculating the defendant's Guidelines sentencing range.

Under that Guidelines principle, the sentences imposed on petitioners were proper—even if, as petitioners argue (Br. 7), the general verdict of guilty on the conspiracy charges against them was "fundamentally ambiguous," and the district court was therefore not permitted to "assume [that] the offense of conviction [was] conspiracy to distribute cocaine base." If the district court had "assume[d]" that the "offense of conviction" was a conspiracy with the sole "statutory object" of distributing powder cocaine (see *ibid.*), the Guidelines would nonetheless have required the court to take into account, for purposes of setting petitioners' base offense levels under Section 2D1.1, any illegal activity involving crack cocaine that was part of petitioners' "relevant conduct" under Section 1B1.3. The court would therefore have made the same factual inquiries and findings at sentencing concerning the type and quantity of drugs attributable to each petitioner for purposes of sentencing (see pages 5-6, *supra*); it would have arrived at the same Guidelines ranges; and there is no reason to question that it would have imposed the same sentences. See notes 6-7, *supra*.

That result would have followed even if the indictment in this case had never mentioned crack cocaine. See *Witte*, 515 U.S. at 392-394, 396-397; Guidelines § 1B1.3, application note 3 and background; *id.* § 2D1.1, application note 12. Indeed, it would have followed even if petitioners had been charged separately, under the same indictment, with a parallel count alleging conspiracy to distribute crack cocaine, as petitioners argue would have been permissible (Br. 10), and the jury had specifically *acquitted* them on that charge. *United States* v. *Watts*, *supra*. Petitioners have no basis for requesting any more

favorable result in the circumstances of this case, in which they received notice in the indictment itself that the government believed their crimes involved crack cocaine, and in which they concede (Pet. 37) that the jury could fairly have found them guilty of conspiracy based on the government's trial evidence involving crack cocaine alone.

4. As we acknowledged in our response to the petition in this case (at 10-11), at least three circuits have held that when a general verdict makes it impossible to know what drug or drugs the jury found were involved in a conspiracy, the district court must assume, for purposes of sentencing, that the conspirators dealt only in the drug that produces the lowest sentence under the applicable provisions of the Sentencing Guidelines. See *United States* v. *Bounds*, 985 F.2d 188, 194-195 (5th Cir.), cert. denied, 510 U.S. 845 (1993); *United States* v. *Pace*, 981 F.2d 1123 (10th Cir. 1992), cert. denied, 507 U.S. 966 (1993); *United States* v. *Owens*, 904 F.2d 411 (8th Cir. 1990).[8]

Those decisions are incorrect. None of them discusses (or even cites) the "relevant conduct" provisions of the Guidelines (*e.g.*, § 1B1.3), or the provision (§ 6A1.3) that explicitly commits the resolution of disputes over "factor[s] important to the sentencing determination" to the district court. Nor do they

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[8] The Tenth Circuit has extended its holding in *Pace* to sentencing following a guilty plea. *United States* v. *Bush*, 70 F.3d 557, 559-563 (1995), cert. denied, 116 S. Ct. 795 (1996). In pre-Guidelines cases, two other circuits relied on an "ambiguous verdict" theory in establishing the applicable statutory sentencing ranges for conspiracies to violate 21 U.S.C. 841. *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *United States* v. *Alvarez*, 735 F.2d 461, 466-468 (11th Cir. 1984).

take into account the basic principles that sentencing courts may consider an essentially unlimited variety of information, and that they generally may find, under a preponderance-of-the-evidence standard, any facts that are relevant to their sentencing decisions. See, *e.g.*, 18 U.S.C. 3661; *Watts*, 117 S. Ct. at 635-638; *Nichols* v. *United States*, 511 U.S. 738, 747-748 (1994); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91-93 (1986); Guidelines § 6A1.3, commentary. Indeed, the source of the sentencing principle applied in *Bounds*, *Pace*, and *Owens* remains mysterious. But whatever its source, that principle cannot be reconciled with the Guidelines sentencing process as described and upheld in *United States* v. *Watts*, *supra*. Because "relevant conduct" under the Guidelines includes related criminal acts as to which no jury ever found the defendant guilty, and because petitioners' crack cocaine activities undoubtedly qualified as relevant conduct, the judge properly took the crack cocaine quantities into account in this case, whether or not the conspiracy verdict itself is read to embrace them.

B. Nothing In 21 U.S.C. 841 Or 846 Requires The Imposition Of Lower Sentences In This Case

As we have observed (see notes 6-7, *supra*), petitioners' sentences would not be affected even if, as they contend, the sentencing court were required to calculate their statutory maximum and minimum penalties based solely on the *type* of drug producing the lowest statutory sentence. Perhaps for that reason, petitioners have, in their brief on the merits in this Court, framed statutory arguments that would sweep more broadly, requiring a jury determination of both the type and the *quantity* of substances involved in a drug conspiracy. They argue, for example, that a "Section 846 violation necessarily must specify the threshold facts to identify the statutory penalty range under Section 841." Pet. Br. 22. By "statutory penalty range," petitioners evidently mean one of the intermediate ranges (0-20 years, 5-40 years, or 20 years-life) set out in subsections (A)-(C) of Section 841(b)(1), rather than the full statutory range of no prison sentence at all to life imprisonment. Those intermediate ranges depend not only on the type of drug involved in the offense, but also on the quantity involved.[9]

Petitioners did not raise any such type-*and-quantity* claim either in the court of appeals or in their petition for a writ of certiorari.[10] A new claim is not properly presented for the first time in their brief on the merits in this Court. See, *e.g.*, *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 118 S. Ct. 542, 551-552 (1997); *Taylor* v.

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[9] For example, as petitioners note (Br. 23 n.10), a defendant who conspired to distribute 1 gram of crack cocaine is subject to a maximum term of 20 years' imprisonment, 21 U.S.C. 841(b)(1)(C), while a defendant who conspired to distribute 50 grams of crack cocaine is subject to a minimum 10-year prison term and a maximum term of life imprisonment, 21 U.S.C. 841(b)(1)(A)(iii).

[10] In the court of appeals, petitioners argued only that ambiguity in the jury's conspiracy verdict required either that they be retried or that sentence be imposed "on the basis of the quantity of powdered cocaine involved in the conspiracy." Pet. Joint C.A. Br. 39; see J.A. 180-181. The petition for certiorari in this Court appeared to raise the same claim. Pet. ii, 3-5, 8-16; see especially Pet. 8 ("issue raised" is whether general verdict on conspiracy involving "different kinds of drugs" requires sentencing "on the drug * * * carrying the lesser punishment"); see also U.S. Br. in Resp. I, 11-12 & n.4.

Freeland & Kronz, 503 U.S. 638, 645 (1992). In any event, petitioners' broad argument lacks merit.

1. Petitioners' suggestion that a jury verdict must comprehend all of the facts necessary to specify the statutory sentencing range under Section 841 would have significant implications. Because statutory sentencing ranges depend not only on the type, but also on the quantity, of drugs involved, see 21 U.S.C. 841(b)(1)(A)-(C), petitioners' argument must be that, in sentencing for a drug conspiracy charged under Sections 846 and 841(a), a district court may not apply any of the enhanced statutory sentencing ranges set out in Section 841(b) unless the government has pleaded in the indictment, and the jury has determined, both the type and the quantity of drugs involved in the conspiracy. Neither type nor quantity, however, is an element of the conspiracy offense punished by Section 846.

To be liable for conspiracy, "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas* v. *United States*, 118 S. Ct. 469, 477 (1997); see also, *e.g.*, *United States* v. *Richardson*, 86 F.3d 1537, 1546 (10th Cir.), cert. denied, 117 S. Ct. 588 (1996). In this case, the substantive offenses involved in the charged conspiracy are defined in 21 U.S.C. 841(a). Section 841(a), entitled "Unlawful Acts," provides in relevant part that:

> [I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. 841(a)(1). Thus, so long as the government charges, and the jury finds, that a defendant engaged in specified conduct involving one of the various "controlled substances" identified in or under 21 U.S.C. 812, the offense is complete. See J.A. 183.

The specific nature and quantity of the substance or substances involved become relevant, under Section 841, only in applying subsection (b), entitled "Penalties." That subsection provides that, with certain exceptions, "any person who *violates subsection (a)* of this section shall be *sentenced*" according to rules that prescribe different maximum and minimum sentences for "violation[s] of subsection (a) of this section involving," or "in the case of," particular types and quantities of drugs. 21 U.S.C. 841(b)(1)-(4) (emphasis added). Subsection (b) also specifies additional adjustments for certain prior convictions, or if death or bodily injury results from the use of the substances involved. *Ibid.* These provisions make clear that the type and quantity of drugs involved in a substantive distribution offense under Section 841 are sentencing factors, not elements of the offense.[11]

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[11] The courts of appeals have consistently reached similar conclusions in a variety of particular contexts involving conviction or sentencing under Section 841. See, *e.g.*, *United States* v. *Barnes*, 890 F.2d 545, 551 n.6 (1st Cir. 1989) (type and quantity), cert. denied, 494 U.S. 1019 (1990); *United States* v. *Campuzano*, 905 F.2d 677, 679 (2d Cir.) (quantity), cert. denied, 498 U.S. 947 (1990); *United States* v. *Lewis*, 113 F.3d 487, 489-492 (3d Cir. 1997) (type and quantity), petition for cert. pending, No. 97-5586 (filed Aug. 13, 1997); *United States* v. *Powell*, 886 F.2d 81, 84-85 (4th Cir. 1989) (quantity), cert. denied, 493 U.S. 1084 (1990); *United States* v. *Bounds*, 985 F.2d at 193-194 (Fifth Circuit) (quantity); *United States* v. *Levy*, 904 F.2d 1026, 1033-1034 (6th Cir. 1990) (type and quantity), cert. denied, 498 U.S. 1091 (1991); *United States* v.

Those factors may therefore be determined by the court for purposes of sentencing, without having been either charged in the indictment or found by the jury.[12] See, *e.g.*, *McMillan* v. *Pennsylvania*, 477 U.S. at 84-91.

2. Because Section 841 itself does not require any jury determination of the type and quantity of drugs

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Cooper, 39 F.3d 167, 172 & n.4 (7th Cir. 1994) (and cases there cited) (type and quantity); *United States* v. *Gohagen*, 886 F.2d 1041, 1042-1043 (8th Cir. 1989) (per curiam) (quantity); *United States* v. *Kipp*, 10 F.3d 1463, 1465-1466 (9th Cir. 1993) (quantity); *United States* v. *Reyes*, 40 F.3d 1148, 1150-1151 (10th Cir. 1994) (quantity); *United States v. Williams*, 876 F.2d 1521, 1524-1525 (11th Cir. 1989) (type and quantity); *United States* v. *Lam Kwong-Wah*, 966 F.2d 682, 685-686 (D.C. Cir.) (quantity), cert. denied, 506 U.S. 901 (1992).

[12] The conclusion that type and quantity are not elements of the offense under Section 841 disposes, *a fortiori*, of petitioners' argument (Br. 30-39) that they have been unconstitutionally denied a jury determination on every element of the crime of which they were convicted. There is no question that petitioners had a right to have the jury find that they had entered into a criminal agreement in violation of Section 846. See Pet. Br. 30-31. There is also no question that the jury so found, and that the evidence before it concerning both powder and crack cocaine was sufficient to sustain that finding. See *id.* at 37. It is not true, however, that "the identity of the controlled substance must be treated as an element of a Section 846 conspiracy charge on which the defendant has the right to a unanimous verdict," or that petitioners' sentences "assumed that the offense of conviction was conspiracy to distribute cocaine base." *Id.* at 33. As petitioners concede, even if the government had charged them with two conspiracies, and even if the jury had acquitted on one charge, the court could nonetheless have "consider[ed] evidence of the other conspiracy in deciding what sentence to impose." *Id.* at 32; see, *e.g.*, *Watts*, *supra*. Even on petitioners' interpretation of the indictment and verdict, that is all that happened here.

involved in a defendant's conduct (other than a determination that it involved a detectable quantity of some controlled substance) in order to convict and sentence a defendant for a substantive distribution offense, Section 846 requires no similar determination in order to find and punish a conspiracy to violate Section 841. Petitioners argue (Br. 11-17) that because Section 846 punishes agreements to commit substantive drug offenses, and because it incorporates by reference the penalties applicable to those offenses, Congress must have intended that the jury find, "as an element of the [conspiracy] offense" (Br. 15), every fact necessary to determine the applicable penalty under the substantive provision. The language of Section 846, however, requires only that the government plead and prove an agreement to commit one or more substantive offenses, the elements of which are defined in other provisions. If the defendant is convicted of entering into such an agreement, then Section 846 authorizes the court to impose the punishments authorized for those substantive offenses. Petitioners suggest no reason for requiring the government to plead or prove more to establish an agreement to violate Section 841(a)(1), or to impose an appropriate punishment for that agreement, than it would have had to show to convict and punish the defendant for a completed substantive offense under that Section.

If the type and quantity of drugs involved in a conspiracy were truly "elements" of the offense defined by Section 846, the failure to plead and prove those elements would invalidate not only petitioners' sentences, but their conspiracy convictions as well. Petitioners, however, have not advanced that claim,

either in this Court or in the courts below.[13] Moreover, petitioners' interpretation would seemingly also require the government to plead and prove to the jury prior convictions (or any other statutory factor) that might affect the defendant's sentence under a particular substantive provision. See, *e.g.*, 21 U.S.C. 841(b)(1)-(3). As petitioners concede (Br. 15), however, Congress plainly intended that prior convictions, at least, would be proved to the court at sentencing, rather than to the jury at trial. See 21 U.S.C. 851.

Petitioners' arguments based on legislative history (Br. 17-19) are no more persuasive. It is true that Congress amended Section 846, in 1988, to clarify that it was meant to incorporate the minimum, as well as the maximum, penalties prescribed for the various substantive offenses that might be the objects of a drug conspiracy. Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6470(a), 102 Stat. 4377. Contrary to petitioners' contentions (Br. 17-18), however, neither that clarifying amendment, nor the fact that there are statutory minimum penalties for some offenses but not for others, implies anything about whether Section 846 requires pleading or proof of the type (or amount) of a controlled substance involved in a conspiracy to violate Section 841(a). Nor does the proposition (Pet. Br. 18-19) that Congress has long considered the type and quantity of substances involved to be highly salient factors in measuring the gravity of a drug offense suggest that

[13] Amici National Association of Criminal Defense Lawyers *et al.* do expressly embrace that argument (Br. 7, 26 n.14). Although amici take petitioners' theory to its logical conclusion, if accepted that theory would radically tranform the trial of drug conspiracy charges under Section 846 in a manner that has no support in the statute or relevant precedent.

Congress intended to make those considerations elements of the offense. Section 841, as Congress enacted it, gives great weight to type and quantity as sentencing factors. Section 846 incorporates those factors, and the maximum and minimum sentences that may depend on them, through its simple cross-reference to all of the substantive drug offenses and their respective statutory penalty provisions.

C. The Sentences Imposed In This Case Are Consistent With The Constitution And With General Principles Of Conspiracy Law

Petitioners raise a number of other arguments attacking the validity of the sentences imposed in this case. Pet. Br. 20-46. Most of those arguments rest on the same fundamental misconception.[14] Petitioners insist (Br. 10) that they were indicted for a conspiracy that involved "multiple possible objects: an agreement to distribute cocaine, an agreement to distribute cocaine base, or an agreement to do both." As the court of appeals recognized (J.A. 183-184), however, that is an inaccurate description. The indictment in this case charged petitioners with participating in *one agreement* to commit substantive offenses of two sorts (distribution of a controlled substance and possession of such a substance with the intent to distribute it), involving two particular controlled substances (powder and crack cocaine). See *Braverman* v. *United States*, 317 U.S. 49, 54 (1942) ("The allegation in a single count of a conspiracy to commit

[14] Most of them are also being made for the first time in this Court. See page 21 and note 10, *supra*. Compare, for example, Pet. Br. 23-27 with J.A. 183-184 (mentioning *Stirone* v. *United States*, 361 U.S. 212 (1960), but noting that "defendants do not argue variance").

several crimes is not duplicitous, for the conspiracy is the crime, and that is one, however diverse its objects.") (internal quotation marks omitted). The jury returned guilty verdicts after the judge correctly instructed that it could find petitioners guilty of conspiracy if it found that the government had proved an agreement to commit any one of the crimes specified in the indictment. J.A. 14-16; see *Turner* v. *United States*, 396 U.S. 398, 419-420 (1970); *Griffin* v. *United States*, 502 U.S. 46, 49-51, 56-60 (1991). The sentences that the judge subsequently imposed fall within the limits specified in the applicable statutory and Guidelines provisions. At no step in this process can petitioners show constitutional or legal error.

1. The court of appeals suggested that an indictment under 21 U.S.C. 841 and 846 "could charge the defendants with 'conspiring to distribute controlled substances,'" without specifying either the type or the quantity of the substances involved. J.A. 183. Petitioners argue at length (Br. 39-46) that an indictment in that form would deprive the defendants named in it of a due process right to timely notice of the maximum statutory penalty for the offense with which they were charged. That is incorrect, but in any event the argument has little to do with this case.

The indictment in this case *did* identify the particular controlled substances that petitioners were charged with conspiring to possess and distribute. It did not specify any quantity, and petitioners had not heretofore complained of that omission; yet, as petitioners concede, specification of quantity would be essential to give a hypothetical defendant any more notice of applicable penalties than he would receive from the Seventh Circuit's hypothetical indictment. See Pet. Br. 44 ("[W]ithout identification of the drugs

and quantity thresholds, the purpose of the notification requirement is defeated and the notice is ineffective.") (emphasis added). Petitioners knew the type of drugs they had been charged with distributing, and they had full access to the statutory and Guidelines sentencing provisions that would determine what sentences would be available. They were not further entitled to notice of the specific quantities of drugs that the government had reason to believe were involved in the conspiracy.

The indictment in this case, by charging a conspiracy to possess and distribute both powder and crack cocaine, in a specific place, within a specific time frame, and with specific participants (J.A. 5-10), adequately apprised petitioners of the nature of the charges they must be prepared to meet at trial, and sufficiently identified the offense at issue to allow them to plead the indictment in bar in any subsequent prosecution for the same offense. Those are the constitutional standards of notice that apply to an indictment. See, *e.g.*, *United States* v. *Miller*, 471 U.S. 130, 134-135 (1985); *Hamling* v. *United States*, 418 U.S. 87, 117-119 (1974); *Russell* v. *United States*, 369 U.S. 749, 763-764 (1962).[15] What petitioners evidently now demand is pre-trial access to specific information concerning what evidence the government actually possesses and will be able to prove at trial or at sentencing. That claim relates to the appropriate limits of criminal discovery; it has

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[15] Various non-constitutional notice requirements may also apply. See, *e.g.*, Fed. R. Crim. P. 7(c)(1) (requiring any indictment to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged") and (f) (bills of particulars).

nothing to do with the question on which this Court granted review.

2. Petitioners contend (Br. 23-27) that, even if the indictment in this case was facially sufficient, the jury's verdict and the sentence that the court imposed somehow involved a "constructive amendment" of that indictment. That claim is difficult to understand, because the remedy for a true constructive amendment would presumably be reversal of petitioners' convictions, not merely a limitation on their sentence. See, *e.g.*, *Stirone* v. *United States*, 361 U.S. 212 (1960). In any event, the argument is without merit.

Petitioners rely on *Stirone* and on *United States* v. *Wozniak*, 126 F.3d 105 (2d Cir. 1997). In *Stirone*, the defendant was charged with interfering, through extortion, with the movement of sand through interstate commerce, but the jury was instructed that it could convict based on evidence presented at trial that the defendant had also interfered with the interstate movement of steel. 361 U.S. at 213-214. This Court concluded that that instruction added a "new basis for conviction" that differed substantially from the charge set out in the indictment, and therefore violated the defendant's right to be convicted only on a charge actually preferred against him by the grand jury. 361 U.S. at 217. In *Wozniak*, the Second Circuit applied *Stirone* to hold that, on particular facts, proof at trial of distribution and use of marijuana could not support conviction under an indictment that charged only transactions in methamphetamine and cocaine. 126 F.3d at 109-111.[16] Those cases have no

[16] Differences between the types of drugs specified in an indictment and those shown to have been involved in the transactions proved at trial are not necessarily fatal. See, *e.g.*, *Wozniak*, 126 F.3d at 110-111 (distinguishing *United States* v. *Knuckles*, 581 F.2d 305 (2d Cir.), cert. denied, 439 U.S. 986 (1978)); *United States* v. *Lewis*, 113 F.3d at 492-493 (no variance where indictment specified crack cocaine but jury might have found powder).

application here. The indictment in this case specified both powder and crack cocaine, the proof at trial involved both of those substances and no other, and the jury was not instructed that it could base its verdict on evidence of transactions involving any other drug.

Petitioners argue (Br. 23-24) that there was an impermissible variance because the government charged two conspiracies (one involving powder and one involving crack), but the court of appeals upheld petitioners' sentences on the theory that they had been found guilty of only one conspiracy involving two drugs. As we have explained, the premise of that argument is false: The government charged only one conspiracy in this case. Even if the government had charged two different conspiracies in one count, however, proof of either one would have been sufficient to support petitioners' convictions. See, *e.g.*, *Miller*, 471 U.S. at 135-136; *Griffin*, *supra* (general verdict of guilty on a multiple-object conspiracy charge may be valid if sufficient evidence exists to support any of the objects). Moreover, in this case, the permissible penalties for each of the two conspiracies that petitioners posit would have been established by the same criminal statute (Section 841), and the indictment in no way limited the sentence that could permissibly be imposed with respect to either hypothetical separate conspiracy. Accordingly, on the facts of this case, petitioners can show neither any variance between

the indictment and their convictions, nor any uncertainty about the proper determination of their sentences.

The case would be more difficult if there were some plausible way to assign different statutory maximum penalties to the different possible grounds for conviction specified in the indictment, and if the sentencing court imposed a sentence in excess of the lower statutory maximum. See, *e.g.*, Pet. Br. 22-23 & n.10; J.A. 182-184; *United States* v. *Orozco-Prada*, 732 F.2d 1076, 1083-1084 (2d Cir.), cert. denied, 469 U.S. 845 (1984); *Brown* v. *United States*, 299 F.2d 438 (D.C. Cir.), cert. denied, 370 U.S. 946 (1962). If a defendant were convicted on only one *substantive* count of, for example, using a communication facility in committing a felony drug offense, in violation of 21 U.S.C. 843(b), then the court could impose no more than the maximum prison term authorized by Section 843(d) for that offense—even if the government's evidence, at trial or sentencing, established beyond any doubt that the defendant had also distributed large amounts of crack cocaine. We do not concede, however, that the same analysis applies in the context of a conspiracy to violate more than one statute, where the different object offenses have different sentencing provisions and a general verdict does not identify which statute or statutes the conspirators agreed to violate. Compare *United States* v. *Ross*, No. 96-3556, 1997 WL 780056, at *20-*27 (11th Cir. Dec. 19, 1997) (under the Guidelines, court may determine the object(s) of a conspiracy in violation of 18 U.S.C. 371 at sentencing, but should apply the beyond-a-reasonable-doubt standard); *United States* v. *Conley*, 92 F.3d 157, 165-167 (3d Cir. 1996) (same), cert. denied, 117 S. Ct. 1244

(1997); Guidelines § 1B1.2(d) & application note 5 (same).[17]

The resolution of that issue would not, in any event, affect petitioners' sentences. Even if the indictment returned against petitioners could be read to charge, alternatively, either a conspiracy to distribute cocaine or a conspiracy to distribute cocaine base, the indictment contained no specification as to the quantity of either drug involved in petitioners' offense. A conviction on either basis would therefore have rendered each petitioner statutorily amenable to punishment ranging from no prison term to life in prison, depending on the quantity of the drug involved—a fact

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[17] As petitioners point out (Br. 28 & n.13), some courts have held that, in determining statutory sentencing ranges under Section 841(b), a court may rely only on quantities of drugs that were "involved" in the "offense of conviction." See *United States* v. *Lewis*, 110 F.3d 417, 422-423 (7th Cir.), cert. denied, 118 S. Ct. 149 (1997); *United States* v. *Estrada*, 42 F.3d 228, 232 & n.4 (4th Cir. 1994); *United States* v. *Winston*, 37 F.3d 235, 240-241 (6th Cir. 1994); *United States* v. *Darmand*, 3 F.3d 1578, 1581 (2d Cir. 1993); compare *United States* v. *Reyes*, 40 F.3d 1148, 1150-1151 (10th Cir. 1994) (sentencing court may consider quantities established at sentencing). With respect to conspiracies under Section 846, however, even the cases on which petitioners rely have recognized that the inquiry into what drugs were "involved" in the Section 846 offense is very similar to the question of relevant conduct under the Guidelines, because "each conspirator is responsible for drug amounts handled by co-conspirators if those amounts were foreseeable to him and in furtherance of the jointly undertaken criminal activity to which he agreed." *Lewis*, 110 F.3d at 423; see also *Estrada*, 42 F.3d at 232 n.4 (in a conspiracy case, sentencing court "must assess the offense of conviction conduct to determine the quantity of drugs that was reasonably foreseeable to the defendant and within the scope of the defendant's agreement.").

that the district court would necessarily have found at sentencing. As we have explained (see pages 14-19, *supra*), the Guidelines would then have required consideration of all of each petitioner's relevant conduct, as found by the court; and the sentences the court imposed under the Guidelines were within the proper statutory ranges, however those ranges might be calculated (see pages 15-16 & notes 6-7, *supra*).

3. Petitioners contend (Br. 27-30) that sentencing them for a drug conspiracy (as found by the jury) on the basis of all the drugs the conspiracy involved (as found by the district court) conflicts with cases that have addressed whether particular acts, in violation of particular statutes, constitute separate "offenses" for purposes of the Double Jeopardy Clause. Petitioners rely (Br. 28-29) on cases indicating that two separate offenses may be charged based on one course of conduct. See, *e.g.*, *United States* v. *Watts*, 117 S. Ct. at 634 (use of a firearm (21 U.S.C. 924(c)) and possession with intent to distribute (§ 841(a)); separate instances of possession with intent (§ 841(a))); *Witte* v. *United States*, 515 U.S. at 392, 394, 396 (attempted possession with intent to distribute (§§ 841 and 846) and conspiracy and attempt to import (§§ 952(a) and 963)). Contrary to petitioners' assertion (Br. 29-30), however, nothing in *Watts*, *Witte*, or the lower court cases on which petitioners rely stands for the broad proposition that "the offense of conviction *under Section 846* is identifiable by the particular drug distributed or possessed" (emphasis added). A conspiracy offense is different, for Double Jeopardy purposes, from the substantive offenses that particular conspirators may have committed during the conspiracy. *United States* v. *Felix*, 503 U.S. 378, 387-392 (1992); *Pinkerton* v. *United States*, 328 U.S. 640

(1946). It is defined by the scope and nature of the conspirators' agreement. That agreement may be limited to one or more specific crimes, such as the distribution of a particular controlled substance on a particular occasion, or it may encompass the commission of multiple crimes. The scope of the agreement depends on the intentions of the particular conspirators involved. *Braverman*, 317 U.S. at 52-53.

The conspiracy count in this case charged one "offense" because it charged one conspiracy—*i.e.*, one agreement. That one agreement, however, contemplated the commission of hundreds, if not thousands, of separate substantive offenses, involving the possession and distribution of different controlled substances at different times and places. See J.A. 7-10 (indictment). The fact that such multiple offenses might support cumulative punishment in a prosecution for the substantive crimes (see cases cited at Pet. Br. 27) is in no way inconsistent with the view that, in a conspiracy case, a single agreement may embrace a plan to commit multiple substantive crimes.

For much the same reason, petitioners' discussion (Br. 34-38) of *Schad* v. *Arizona*, 501 U.S. 624 (1991), and *Griffin* v. *United States*, *supra*, does not help them. The plurality opinion in *Schad* indicates that the requirement of a unanimous jury verdict does not require jurors to agree on a particular alternative means of committing an offense, where there is widespread use of an offense definition involving such alternative means and where the means are of rough moral equivalence. 501 U.S. at 637-645. A single conspiracy to undertake a course of conduct that would involve violating Section 841 in various different ways satisfies that standard. An agreement to

violate a particular drug law may be carried out through a variety of means (such as by distributing either crack or powder cocaine), but each of those means satisfies the same element of the offense. Petitioners cite no historical evidence that that is a "freakish definition of the elements of the offense," *Schad*, 501 U.S. at 640 (plurality opinion), or that there is any substantial difference in the morality of the alternative "means" involved in this case.

Nor does *Griffin* assist petitioners. The common law rule, the Court observed in that case, is that "a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." 502 U.S. at 49. That rule "applied to the [conspiracy] situation at issue [in *Griffin*]: a general jury verdict under a single count charging the commission of an offense [*i.e.*, a conspiracy to defraud the government, in violation of 18 U.S.C. 371] by two or more means" —*i.e.*, by obstructing one federal department or another. *Id.* at 50. That holding does not support petitioners' contention (Br. 37) that, in a drug conspiracy case involving two means of violating the same substantive offense, the jury must specifically agree on which means (*e.g.*, distributing which of two controlled substances) forms the basis of the verdict.

4. All of the claims discussed above grow out of petitioners flawed argument (Br. 20-21) that the government's position is inconsistent with "general conspiracy principles." We agree with petitioners (Br. 20) that the agreement to commit some crime is the essence of a conspiracy offense. There is no support, however, for their assertion that "the identity of the drug is a central feature of the agreement" in a conspiracy under Section 846.

An agreement violates Section 846 if it contemplates the commission of acts that, taken together, will satisfy all the elements of one of a number of specified drug trafficking offenses. Cf. *Salinas*, 118 S. Ct. at 477. The specification of those elements is, in turn, "entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994). As we have explained (see pages 22-23, *supra*), Congress has structured Section 841(a) so that it is violated by the distribution of any "controlled substance"; and an agreement to distribute any such substance is therefore a complete conspiracy. See *United States* v. *Gomez*, 905 F.2d 1513 (11th Cir. 1990) (defendant may be convicted and punished for conspiracy and possession even if he knew only that the substance involved was an illegal drug), cert. denied, 498 U.S. 1092 (1991); *United States* v. *Herrero*, 893 F.2d 1512, 1534-1535 (7th Cir.) (similar), cert. denied, 496 U.S. 927 (1990). For example, an agreement between two individuals to purchase, divide, and resell a shipment of illegal drugs that one of them expects to receive from a criminal contact violates the law—even if the conspirators do not know, at the time that they agree, what type of drugs the contact will be able to procure.

Of course, the point is largely theoretical. Generally, as here, the drugs involved in a conspiracy will be known to the conspirators; and generally, as here, at least the type or types of drug involved will be identified in the indictment and proved at trial, although the jury will not be asked to render a specific verdict concerning type or quantity. That practice accords as well with generally applicable principles of fair notice. See, *e.g.*, *Miller*, 471 U.S. at 134-135; Fed.

R. Crim. P. 7(c)(1) (requiring any indictment to contain "a plain, concise and definite written statement of the essential facts constituting the offense charged"). In light of those principles, there is no foundation for petitioners' concern (Br. 21) that the government might attempt to bring indictments without content or to try cases without coherent theories of guilt. Certainly this is not such a case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1998

APPENDIX

United States Sentencing Guidelines
As amended to November 1, 1994

Chapter One - Introduction And General Application Principles

* * * * *

Part B - General Application Principles

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§1B1.3. Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) *Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence).* Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

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2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

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With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

* * * * *

3. "Offenses of a character for which §3D1.2(d) would require grouping of multiple counts," as

used in subsection (a)(2), applies to offenses for which grouping of counts would be required under §3D1.2(d) had the defendant been convicted of multiple counts. Application of this provision does not require the defendant, in fact, to have been convicted of multiple counts. For example, where the defendant engaged in three drug sales of 10, 15, and 20 grams of cocaine, as part of the same course of conduct or common scheme or plan, subsection (a)(2) provides that the total quantity of cocaine involved (45 grams) is to be used to determine the offense level even if the defendant is convicted of a single count charging only one of the sales. If the defendant is convicted of multiple counts for the above noted sales, the grouping rules of Chapter Three, Part D (Multiple Counts) provide that the counts are grouped together. Although Chapter Three, Part D (Multiple Counts) applies to multiple counts of conviction, it does not limit the scope of subsection (a)(2). Subsection (a)(2) merely incorporates by reference the types of offenses set forth in §3D1.2(d); thus, as discussed above, multiple counts of conviction are not required for subsection (a)(2) to apply.

As noted above, subsection (a)(2) applies to offenses of a character for which §3D1.2(d) would require grouping of multiple counts, had the defendant been convicted of multiple counts. For example, the defendant sells 30 grams of cocaine (a violation of 21 U.S.C. § 841) on one occasion and, as part of the same course of conduct or common scheme or plan, attempts to sell an additional 15 grams of cocaine (a violation of 21

U.S.C. 846) on another occasion. The defendant is convicted of one count charging the completed sale of 30 grams of cocaine. The two offenses (sale of cocaine and attempted sale of cocaine), although covered by different statutory provisions, are of a character for which §3D1.2(d) would require the grouping of counts, had the defendant been convicted of both counts. Therefore, subsection (a)(2) applies and the total amount of cocaine (45 grams) involved is used to determine the offense level.

* * * * *

Background:

This section prescribes rules for determining the applicable guideline sentencing range, whereas §1B1.4 (Information to be Used in Imposing Sentence) governs the range of information that the court may consider in adjudging sentence once the guideline sentencing range has been determined. Conduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range. The range of information that may be considered at sentencing is broader than the range of information upon which the applicable sentencing range is determined.

* * * * *

Subsection (a)(2) provides for consideration of a broader range of conduct with respect to one class of offenses, primarily certain property, tax, fraud

and drug offenses for which the guidelines depend substantially on quantity, than with respect to other offenses such as assault, robbery and burglary. The distinction is made on the basis of §3D1.2(d), which provides for grouping together (*i.e.*, treating as a single count) all counts charging offenses of a type covered by this subsection. However, the applicability of subsection (a)(2) does not depend upon whether multiple counts are alleged. Thus, in an embezzlement case, for example, embezzled funds that may not be specified in any count of conviction are nonetheless included in determining the offense level if they were part of the same course of conduct or part of the same scheme or plan as the count of conviction. Similarly, in a drug distribution case, quantities and types of drugs not specified in the count of conviction are to be included in determining the offense level if they were part of the same course of conduct or part of a common scheme or plan as the count of conviction. On the other hand, in a robbery case in which the defendant robbed two banks, the amount of money taken in one robbery would *not* be taken into account in determining the guideline range for the other robbery, even if both robberies were part of a single course of conduct or the same scheme or plan. (This is true whether the defendant is convicted of one or both robberies.)

Chapter Two - Offense Conduct

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Part D - Offenses Involving Drugs

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§2D1.1. <u>Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy</u>

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) below.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import to export the controlled substance, or (B) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26.**

(c) Drug Quantity Table [omitted]

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Commentary

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Application Notes:

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12. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. *See* §1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

If the offense involved both a substantive drug offense and an attempt or conspiracy (*e.g.*, sale of five grams of heroin and an attempt to sell an additional ten grams of heroin), the total quantity involved shall be aggregated to determine the scale of the offense.

In an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not reasonably capable of producing

the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

* * * * *

§6A1.3. Resolution of Disputed Factors (Policy Statement)

(a) When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor. In resolving any reasonable dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy.

(b) The court shall resolve disputed sentencing factors in accordance with Rule 32(a)(1), Fed. R. Crim. P. (effective Nov. 1, 1987), notify the parties of its tentative findings and provide a reasonable opportunity for the submission of oral or written objections before imposition of sentence.

Commentary

In pre-guidelines practice, factors relevant to sentencing were often determined in an informal fashion. The informality was to some extent explained by the fact that particular offense and offender characteristics rarely had a highly specific or required sentencing consequence. This situation will no longer exist under sentencing guidelines. The court's resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment. More formality is therefore unavoidable if the sentencing process is to be accurate and fair. Although lengthy sentencing hearings should seldom be necessary, disputes about sentencing factors must be resolved with care. When a reasonable dispute exists about any factor important to the sentencing determination, the court must ensure that the parties have an adequate opportunity to present relevant information. Written statements of counsel or affidavits of witnesses may be adequate under many circumstances. An evidentiary hearing may sometimes be the only reliable way to resolve disputed issues. *See United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979) *cert. denied*, 444 U.S. 1073 (1980). The sentencing court must determine the appropriate procedure in light of the nature of the dispute, its relevance to the sentencing determination, and applicable case law.

In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial. 18 U.S.C. § 3661. Any information may be considered, so long as it has "sufficient indicia

of reliability to support its probable accuracy." *United States v. Marshall*, 519 F. Supp. 751 (E.D. Wis. 1981), *aff'd*, 719 F.2d 887 (7th Cir. 1983); *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978) *cert. denied*, 444 U.S. 1073 (1980). Reliable hearsay evidence may be considered. Out-of-court declarations by an unidentified informant may be considered "where there is good cause for the nondisclosure of his identity and there is sufficient corroboration by other means." *United States v. Fatico*, 579 F.2d at 713. Unreliable allegations shall not be considered. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971) *cert. denied*, 404 U.S. 1061 (1972).

The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case.

If sentencing factors are the subject of reasonable dispute, the court should, where appropriate, notify the parties of its tentative findings and afford an opportunity for correction of oversight or error before sentence is imposed.